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December 17, 2004

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: November 5, 2004

Case No.: TIA-0312

XXXXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits based on the employment of her deceased father, XXXXXXXXXXXX (the worker). The applicant's late father worked at several facilities, including Argonne National Laboratory in Argonne, Illinois. The OWA determined that the worker did not meet the eligibility criteria for coverage under the regulations that were in effect at the time the determination was made. The OWA therefore determined that the applicant was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the OWA prematurely denied the applicant's claim.

**I. The Relevant Statute and Regulations**

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons programs. *See* 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. *See* 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. The DOE program was specifically limited to DOE contractor employees<sup>1</sup> who worked at DOE facilities.<sup>2</sup> The reason for this

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<sup>1</sup> A DOE contractor is defined as follows: (a) an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months; (b) an individual who is or was employed at a DOE facility by (i) an entity that contracted with DOE to provide management and operation, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility. 10 C.F.R. § 852.2.

<sup>2</sup> A DOE facility is defined as: any building, structure or premise, including the grounds upon which such building, structure, or premise is located: (a) in which operations are, or have been, conducted by, or on behalf of the DOE (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344 dated February 1, 1982 (42 U.S.C. § 7158 note), pertaining to Naval Nuclear Propulsion Program); and (b) with regard to which DOE has or had (i) a propriety interest; or (ii) entered into a

limitation was that the DOE could not be involved in state workers' compensation proceedings involving other employers. Under the DOE program, the OWA first had to decide whether a claim filed under Subpart D was submitted by or on behalf of a person who was or had been a DOE contractor employee who worked at a DOE facility.<sup>3</sup> If the OWA found that the person met the threshold eligibility criteria, the OWA sent the claim to an independent physician panel whose job it was to assess whether a claimed illness or death arose out of and in the course of the worker's employment and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule).

On October 28, 2004, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act – Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. OHA continues to process appeals which were pending when Congress repealed Subpart D, such as the one at issue here, until DOL commences Subpart E administration.

## **II. The Appeal**

In the case at hand, the OWA declined to present the applicant's application to a Physicians Panel because the office determined that the applicant did not meet the eligibility requirements for the Physicians Panel Process. *See* October 6, 2004 letter from the OWA to the applicant.

In the original application that she filed with the OWA, the applicant stated that her deceased father worked at "The Metallurgical Laboratory, University of Chicago/Argonne National Laboratory" from October 1, 1943 to September 30, 1945 and at The University of Chicago from June 1941 to June 1949. The applicant further claims that her deceased father was exposed to beryllium, uranium, boron and mercury while conducting research for the Manhattan Project at these facilities.<sup>4</sup>

In her appeal, the applicant argues that OWA incorrectly determined that her father did not work for a DOE contractor at a DOE facility during a period covered by the Subpart

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contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 10 C.F.R. § 852.2.

<sup>3</sup> Pursuant to an Executive Order,<sup>3</sup> the DOE published a list of facilities covered by the DOL and DOE programs, and the DOE designated next to each facility whether it fell within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 69 Fed. Reg. 51,825 (August 23, 2004) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 69 Fed. Reg. 51,825.

<sup>4</sup> The applicant advised OHA during a telephone conversation that she had submitted approximately 200 pages of documentation to OWA to support her claim. *See* Record of Telephone Conversation between Ann S. Augustyn, OHA Deputy Assistant Director, and XXXXXXXXXXXX ( November 16, 2004).

D regulations. She states that her deceased father worked for The University of Chicago at a time when that university was a DOE contractor, and that her father worked at the Argonne National Laboratories at a time when that institution was considered a DOE facility. To support her argument, the applicant submits copies of her late father's personnel records that she obtained from Argonne National Laboratory.

### **III. Analysis**

The pivotal question on appeal is whether the applicant's deceased father was employed at a DOE facility by a DOE contractor. *See* 10 C.F.R. § 852.1(b). To determine whether the worker in question was a DOE contractor employee under the applicable statute and regulations, we consulted the DOE's published facilities list set forth at 69 Fed. Reg. 51,825. On that list, Argonne National Laboratory - East <sup>5</sup> is listed as a "DOE" facility. We next reviewed the OWA web site for additional information. There, we learned that the University of Chicago has operated Argonne National Laboratory-East continuously as a DOE facility from 1946 until the present time.

We next contacted representatives from the DOE's Environment, Safety and Health Office (EH) who possessed historical knowledge about the DOE's contractors at sites throughout the country. The EH representatives advised us that prior to 1946, the Metallurgical Laboratory was housed in and run exclusively by the University of Chicago. *See* Record of Telephone Conversation between Ann S. Augustyn, OHA Deputy Assistant Director, and Roger Anders and Caroline Anders, EH representatives (November 10, 2004). According to the EH representatives, all the people and equipment associated with the Metallurgical Laboratory were transferred to the newly formed Argonne National Laboratory sometime in the summer or fall of 1946. *Id.* At that time, the University of Chicago became the DOE's Management and Operating (M&O) contractor for the Metallurgical Laboratory at the Argonne National Laboratory. *Id.*

At the recommendations of EH representatives, OHA contacted Argonne National Laboratory directly for additional information. OHA learned from Argonne National Laboratory that the OWA had contacted the laboratory and asked it to do an "employment verification" for the worker in question. *See* Record of Telephone Conversation between Ann S. Augustyn, OHA Deputy Assistant Director, and Georgette Lang, Argonne National Laboratory. Argonne National Laboratory informed us that it has not yet completed its employment verification, and that it had not provided any documentation to the OWA before OWA denied the applicant's claim.

Based on the telephonic information that we received from Argonne National Laboratory, it appears that the OWA prematurely denied the applicant's claim. <sup>6</sup> We will, therefore, remand the applicant's application for appropriate processing.

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<sup>5</sup> Argonne National Laboratory – East denotes Argonne National Laboratory's operations in Chicago, Illinois. Argonne National Laboratory-West refers to Argonne National Laboratory's operations in Idaho.

<sup>6</sup> Our independent review of the personnel records provided on appeal supports the applicant's contention that her deceased father worked as a consultant under a subcontract with the University of Chicago during the period of time that the University of Chicago acted as an M&O contractor to the DOE.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0312 be, and hereby is, granted as set forth in paragraph 2 below.
- (2) The Applicant's claim warrants further consideration.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: December 17, 2004